Lai Cheng Ooi (f) (the executrix of the estate of Lee Tain Tshung @ Lee Thien Chiung, deceased) v Lim San Peen (liquidator for Naslei Enterprise Sdn Bhd) & Anor and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS S-01(IM)(NCVC)-145–04 OF 2016, S-02(IM)(NCVC)-741–04 OF 2016 AND S-01(IM)(NCVC)-411–10 OF 2016

ABDUL RAHMAN SEBLI, KAMARDIN HASHIM AND HARMINDAR SINGH JJCA

21 SEPTEMBER 2017

C

Civil Procedure — Setting aside — Ex parte order — Whether High Court functus officio because order granting leave sealed and perfected — Whether High Court had power or jurisdiction to set aside order made by another High Court judge of concurrent jurisdiction

D

There were three appeals: two of which arose from the learned High Court judge's decision in setting aside the grant of leave to the appellant to commence action against the liquidator appointed to Naslei Enterprise Sdn Bhd ('Naslei'), the official receiver appointed to Tamparuli Granite Quarry (Sabah) Sdn Bhd ('Tamparuli'), and the two companies Naslei and Tamparuli; the third appeal arose from the learned High Court judge's decision to strike out the appellant's suit and disallow the appellant's application to amend the writ and statement of claim. The appellant had obtained leave pursuant to two ex parte applications to commence action against Naslei, which was under receivership, and Lim San Peen. The receivers appointed to Naslei had obtained an order in 1991 ('the 1991 order') which stated, 'no action, application or other proceedings shall be commenced continued or maintained against the respondent and/or the court appointed receivers and managers thereof without first leave of this court being obtained'. After obtaining the ex parte orders for leave, the appellant commenced an action against Naslei, Lim San Peen, Tamparuli, the official receiver and Danaharta Urus Sdn Bhd ('the respondents') for specific performance of the sale and purchase agreement between Naslei and Tamparuli. The respondents filed three separate applications to strike out the writ and statement of claim when it was disclosed by the appellant in her reply that the ex parte orders for leave were obtained to commence action. Naslei and Lim San peen made applications to set aside the ex parte orders. The learned judge set aside the two ex parte orders for leave which were granted by a different High Court judge. The appellant's writ and statement of claim was struck out by all the respondents. The appellant's application to amend the writ and statement of claim was also struck out. The issues for consideration were:

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(a) whether the High Court was functus officio because the order granting leave was sealed and perfected; and (b) whether the High Court had power or jurisdiction to set aside an order made by another High Court judge of concurrent jurisdiction.

Held, dismissing the appeals with costs:

(1) Any ex parte order was liable to be set aside by the party which had been served with such an order or by any party which was affected by such order. The court was not functus officio as the right of the party affected to be heard remained subsisting. Separate proceedings to impeach the ex parte order were not mandatory. Orders obtained in breach of the rules of natural justice could be set aside in the same proceedings or in collateral proceedings *ex debito justitiae* (see para 12).

(2) The appellant was in breach of the 1991 order which clearly stated that any application for leave to commence proceedings against Naslei and the receiver should be heard inter partes. No action could be brought against a receiver without leave of the court. Any application for leave cannot exclude the involvement of the receiver (see para 13).

(3) It did not matter whether the same or different judge set aside the ex parte order as either judge would have the jurisdiction to set aside the ex parte orders. As the orders were entered in the absence of parties who ought to have been heard, it would come under the exception to the general rule as to functus officio (see para 15).

(4) Regarding the third appeal, the learned counsel for the appellant was right to concede since the leave orders were set aside and the appeals were unsuccessful, she was unable to add anything useful to her written submissions, and the writ action could not be commenced without leave (see para 18).

[Bahasa Malaysia summary

Terdapat tiga rayuan; dua daripadanya berbangkit daripada keputusan hakim Mahkamah Tinggi yang bijaksana dalam mengenepikan pemberian izin kepada perayu untuk memulakan tindakan terhadap likuidator yang dilantik kepada Naslei Enterprise Sdn Bhd ('Naslei'), pegawai penerima dilantik kepada Tamparuli Granite Quarry (Sabah) Sdn Bhd ('Tamparuli'), dan dua syarikat Naslei dan Tamparuli; rayuan ketiga berbangkit daripada keputusan hakim Mahkamah Tinggi yang bijaksana untuk membatalkan tindakan perayu dan tidak membenarkan permohonan perayu untuk meminda writ dan pernyataan tuntutan. Perayu telah memperolehi izin berikutan kepada dua permohonan ex parte untuk memulakan tindakan terhadap Naslei, yang mana adalah di bawah kuasa penerima, dan Lim San Peen. Penerima-penerima yang dilantik kepada Naslei telah memperolehi perintah pada tahun 1991 ('perintah 1991') yang menyatakan, 'no action, application or other proceedings shall be

commenced continued or maintained against the respondent and/or the court appointed receivers and managers thereof without first leave of this court being obtained'. Selepas memperolehi perintah-perintah izin ex parte, perayu memulakan tindakan terhadap Naslei, Lim San Peen, Tamparuli, pegawai penerima dan Danaharta Urus Sdn Bhd ('responden-responden') bagi pelaksanaan spesifik perjanjian jual beli di antara Naslei and Tamparuli. Responden-responden memfailkan tiga permohonan berasingan untuk membatalkan writ dan pernyataan tuntutan apabila ia telah didedahkan oleh perayu dalam jawapannya bahawa perintah-perintah izin ex parte diperolehi untuk memulakan tindakan. Naslei dan Lim San Peen membuat permohonan-permohonan untuk mengenepikan perintah-perintah ex parte. Hakim bijaksana mengenepikan kedua-dua perintah izin ex parte yang telah diberikan oleh hakim Mahkamah Tinggi yang lain. Writ dan pernyataan tuntutan perayu dibatalkan oleh kesemua responden. Permohonan perayu untuk meminda writ dan pernyataan tuntutan juga dibatalkan. Isu-isu untuk pertimbangan adalah: (a) sama ada Mahkamah Tinggi adalah *functus officio* kerana perintah yang memberikan izin dimeterai dan disempurnakan; dan (b) sama ada Mahkamah Tinggi mempunyai kuasa atau bidang kuasa untuk mengenepikan perintah yang dibuat oleh hakim Mahkamah Tinggi yang lain yang bidang kuasa serentak.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Apa-apa perintah ex parte boleh diketepikan oleh pihak yang telah diserahkan dengan perintah sedemikian atau oleh mana-mana pihak yang terjejas dengan perintah sedemikian. Mahkamah tidak *functus officio* kerana hak pihak terjejas untuk didengar kekal wujud. Prosiding berasingan untuk mencabar perintah ex parte bukan mandatori. Perintah-perintah yang diperolehi dalam kemungkiran peraturan-peraturan keadilan semula jadi boleh diketepikan dalam prosiding yang sama atau di dalam prosiding kolateral *ex debito justitiae* (lihat perenggan 12).

(2) Perayu memungkiri perintah 1991 yang jelas menyatakan bahawa apa-apa permohonan bagi izin untk memulakan prosiding terhadap Naslei dan penerima patut didengar inter partes. Tiada tidakan boleh dikenakan terhadap penerima tanpa izin mahkamah. Apa-apa permohonan untuk izin tidak boleh mengecualikan penglibatan penerima (lihat perenggan 13).

(3) Ia tidak kira sama ada hakim yang sama atau berlainan mengenepikan perintah ex parte kerana salah satu daripada hakim mempunyai bidang kuasa untuk mengenepikan perintah-perintah ex parte tersebut. Memandangkan perintah-perintah telah dikeluarkan dalam ketidakhadiran pihak-pihak yang patut didengar, ia akan terangkum di

bawah pengecualian kepada peraturan am terhadap *functus officio* (lihat perenggan 15).

(4) Berkaitan rayuan ketiga, peguam bijaksana bagi perayu adalah betul untuk mengakui memandangkan perintah-perintah izin diketepikan dan rayuan-rayuan adalah tidak berjaya, dia tidak dapat untuk menambah apa-apa yang berguna kepada hujahan bertulisnya, dan tindakan writ tidak boleh dimulakan tanpa izin (lihat perenggan 18).]

Notes

For a case on ex parte order, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8797.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, FC (refd)

L Aruul a/l S Lurthusamy v Ringganazall a/l Ponnigilee & Anor [2017] 2 MLJ 51; [2017] 3 CLJ 546, CA (refd)

Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, interveners) [2000] 3 MLJ 201, CA (refd)

Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors [1995] 1 MLJ 1, SC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19

Appeal from: Originating Summons Nos BKI-24NCVC-44/5 of 2015, BKI-24NCVC-64/7 of 2015 and Civil Suit No BKI-22NCVC-91/8 of 2015 (High Court, Kota Kinabalu)

Sharata Masyaroh bt John Ridwan Lincon (Lincon & Co) for the appellant.
S Vanugopal (S Vanugopal & Partners) for the first and second respondents.
Monica Linsua (Malaysia Insolvency Department) third and fourth respondents.
Wong Heu Fun (Leong & Wong) for the fifth respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] There are three appeals before us. These appeals were ordered to be heard together as the subject matter involves the same property. The first appeal (S-01(IM)(NCVC)-145–04 of 2016) and the second appeal (S-02(IM)(NCVC)-741–4 of 2016) arise from the learned High Court judge's decision in setting aside the grant of leave to the appellant to commence action

against the liquidator appointed to Naslei Enterprise Sdn Bhd and the official receiver appointed to Tamparuli Granite Quarry (Sabah) Sdn Bhd, and the two companies Naslei Enterprise Sdn Bhd; and Tamparuli Granite Quarry (Sabah) Sdn Bhd. The third appeal (S-01(IM)(NCVC)-411–10 of 2016) arises from the learned High Court judge's decision to strike out the appellant's suit and to disallow the appellant's application to amend the writ and statement of claim.

CHRONOLOGY

[2] The appellant, pursuant to two ex parte applications, obtained leave on 19 June 2015 and 18 August 2015 to commence action against Naslei Enterprise Sdn Bhd ('Naslei'), which was under receivership, and Lim San Peen who is the receiver appointed to Naslei as well as Tamparuli Granite Quarry (Sabah) Sdn Bhd ('Tamparuli Granite') and the official receiver appointed for it ('the ex parte orders for leave').

[3] Subsequent to obtaining the ex parte orders for leave, the appellant commenced an action under Suit BKI-22NCvC-91/8 of 2015 against Naslei and Lim San Peen, as the first and second defendants, and Tamparuli Granite and the official receiver as the third and fourth defendants and Danaharta Urus Sdn Bhd as the fifth defendant ('writ action') for specific performance of the sale and purchase agreement dated 10 May 1983 between Naslei and Tamparuli Granite.

[4] The first and second defendants in the writ action, the third and fourth defendants in the writ action, and the fifth defendant in the writ action filed three separate applications to strike out the writ and statement of claim under O 18 r 19 of the Rules of Court 2012 ('the striking out applications'). When it was disclosed by the appellant in her reply that ex parte orders for leave had been obtained to commence action against the two companies and the liquidators, applications were made by Naslei and Lim San Peen to set aside the said ex parte orders.

[5] The High Court in the writ action then held the hearing of the striking out applications in abeyance pending the disposal of Naslei and Lim San Peen's applications to set aside the two ex parte orders for leave. The learned judge upon hearing the applications of Naslei and Lim San Peen on 23 March 2016 set aside the two ex parte orders for leave which were earlier granted by a different High Court judge. Thereafter, the striking out applications in the writ action were proceeded with by the learned judge and on 25 August 2016, the appellant's writ and statement of claim was struck out by all the defendants. The appellant's application to amend the writ and statement of claim was also consequently struck out.

A [6] Being dissatisfied with these decisions, the appellant filed the instant three appeals. These appeals were heard together on 19 May 2017. After hearing the parties and taking into consideration the written submissions, we dismissed the appeals. Our full reasons for doing so now follow and constitutes the judgment of the court.

B

BRIEF BACKGROUND

[7] For a better appreciation of the dispute between the parties, some background facts need to be set out. The facts leading to the appellant C obtaining the ex parte leave orders and then filing the suit can be gathered from the pleadings in the writ action. These facts, as well as the relief sought, which set out in some detail the grievance of the appellant, were also neatly summarised by the learned judge hearing the writ action in p 3 of his judgment as follows:

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> The plaintiff is the widow and executrix of one Lee Tain Tshung ('deceased'). He held 60 per cent of the shares in the third defendant. On 10th May 1983, the third defendant entered into a sale and purchase agreement with the first defendant for the purchase a condominium known as '1202 Waikiki Condominiums' for the E purchase price of RM970,000. The third defendant paid RM304,000 as partial settlement of the purchase price. The plaintiff has averred that a further sum of RM208,886 had been set off against the purchase price because the third defendant supplied building materials to the first defendant. Subsequently, a few events had an impact on the sale and purchase transaction in respect of the said property. On 19th January 1989, the first defendant was placed under a court appointed receiver. Lee F Tain Tshung who held majority shares in the third defendant became a bankrupt on 23rd November 2001. He remained an undischarged bankrupt when he died on 14th June 2008. The third defendant was wound up at the instance of Government of Malaysia upon failure to pay taxes on 18th October 2011. The instant plaintiff obtained grant of probate of the estate of Lee Tain Tshung on 6th February 2014. The first defendant had ran into financial difficulties in the late 1980's and upon G being wound up, works on the entire condominium project was suspended for a long time until recently when it was completed. The plaintiff has now pleaded that since about 80 per cent of the purchase price had been paid, the beneficial interest in the property devolved on the third defendant and its successors in title and assigns H although the property remained registered in the name of the first defendant. She claimed that when a liquidator was appointed to manage the first defendant, the third defendant could have been called to settle the balance of the agreed purchase price of RM186,539.67. However, in breach of his duty, the liquidator did not do so but unlawfully charged the entire project including the condominium in I question to the fifth defendant (Danaharta Urus Sdn Bhd). The plaintiff also pleaded that when the third defendant was wound up and the Official Receiver was appointed as the liquidator (fourth defendant), the property did not vest in him. Furthermore, the plaintiff pleaded that the fourth defendant did not protect the interest of the third defendant when he wrote a letter on 25th March 2014 expressing his intention not to complete the sale and purchase agreement in

question on the ground of insufficient funds held by the third defendant. The first and second defendants terminated the sale and purchase agreement upon receiving this letter.

In this action, the plaintiff is praying for the following reliefs:

(1) an Order that the Deputy Registrar and/or the Senior Assistant Registrar of the High Court be appointed to sign, execute and attest the legal documents such as the Memorandum of Transfer, etc, for all the parties to the conveyance for the transfer of the said property as transferor and transferee;

(2) general damages against the first, second, third, fourth and fifth Defendants for negligence, breach of duty of care and skill, deceit, breach of contract or breach of fiduciary duties, and/or statutory duties, abuse of power, misuse of direction and acting in excess of power or jurisdiction;

(3) such other reliefs as the Court deems just; and

(4) costs against all the five (five defendants);

(5) an Order for the specific performance of the Sales & Purchase Agreement dated the 10.05.1983 entered into between Naslei Enterprise Sdn Bhd, the first Defendant and Tamparuli Granite Quarry (Sabah) Sdn Bhd, the second Defendant;

(6) an order that the third Defendant or its successors in title and assigns pay to the first Defendant the sum of RM186,539.67 being the balance of the agreed price of RM970,000,00 as consideration in full payment for the said property and for the completion of the said Sale & Purchase Agreement as stated therein;

(7) Upon payment of RM186,539.67 as aforesaid, an order that the said property be transferred to the third Defendant or its successors-in-title and assigns or to the Plaintiff or her nominees;

(8) An order that the first Defendant redeem the charge of the said property charged to the fifth Defendant.

THE INSTANT APPEALS

[8] Before us, the parties submitted initially on the appeals against the setting aside of the ex parte orders. In this regard, the High Court in setting aside the said two ex parte orders took note that in the Originating Motion No 4 of 1988, the receivers appointed to Naslei had obtained an order on 9 July 1991 ('the 1991 order') which had the following terms:

> Paragraph (a): that no action, application or other proceedings shall be commenced continued or maintained against the Respondent and/or the Court appointed Receivers and Managers thereof *without first leave of this Court being obtained.* (Emphasis added.)

[9] Now, although no written judgment was provided by the learned judge, in setting aside the said ex parte orders, the learned judge made the following remarks as found in the notes of proceedings:

> When matter came up before Tuan Gabriel, it was an ex parte application and the Court was not made aware of the earlier order made in 1991.
>
> By right notice should be given to Naslei Enterprise Sdn Bhd of any leave application.
>
> Since leave was granted in the absence of Naslei Enterprise, I set aside the ex parte orders granted by YA Tuan Gabriel Gumis dated 19th June 2015 and 18th June 2015 respectively.

[10] Before us, this decision by the learned judge was assailed on a number of grounds. The grounds which merited consideration were as follows. The first ground was that the High Court was functus officio because the order granting leave on 17 May 2015 had been sealed and perfected. The next ground is that the High Court had no power or jurisdiction to set aside an order made by another High Court judge of concurrent jurisdiction.

[11] Relying on the authorities of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 ('Badiaddin'); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 ('Hock Hua Bank'); *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121 and *L Aruul a/l S Lurthusamy v Ringganazall a/l Ponnigilee & Anor* [2017] 2 MLJ 51; [2017] 3 CLJ 546 ('Arul Lurthusamy'), the appellant submitted that the respondents should have appealed against the granting of the ex parte orders or instituted separate proceedings by way of writ action to impeach the said ex parte orders.

[12] In this connection, we hasten to observe that any ex parte order is liable to be set aside by the party who had been served with such an order or by any party which is affected by such order. In setting aside such an order, the court is certainly not functus officio as the right of the party affected to be heard remains subsisting. It is not mandatory, as the appellant appears to suggest, to appeal or to file separate proceedings to impeach the ex parte order. In summary, orders obtained in breach of the rules of natural justice can be set aside in the same proceedings or in collateral proceedings *ex debito justitiae* (see *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, interveners)* [2000] 3 MLJ 201 ('Selvam Holdings').

[13] In the present case, it is plain that the appellant was in breach of the 1991 order which clearly envisaged that any application for leave to commence

proceedings against Naslei or the receiver must be heard inter partes. In any case, it is trite law that a court appointed receiver is an officer of the court and any interference with him or with property under his control constitutes a contempt of court. Therefore, no action can be brought against a receiver without leave of the court (see *Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors* [1995] 1 MLJ 1). It must follow that any such application for leave cannot exclude the involvement of the receiver unlike what had transpired in the present case.

[14] On the next question of whether one High Court may set aside the order made by another High Court judge, we note that this question is intertwined with the issue of functus officio since the orders, in the present case, were made in the same action. The general rule is that once an order of court has been drawn up and perfected, it cannot be set aside in the same action as the court has become functus officio. However, the Federal Court in *Hock Hua Bank Bhd*, where this principle was affirmed, recognised that there may be exceptions to this general principle in that errors can be corrected under the slip rule to reflect the intention of the court and also in the case of judgments in default or made in the absence of a party at a trial or hearing.

[15] In the present case, it must be noted that although the judge setting aside the ex parte orders was a different judge to the one who had granted the orders, the setting aside was done in the same action as mentioned earlier. As the orders were entered in the absence of parties who ought to have been heard, this would come under the exception to the general rule as to functus officio. It did not matter whether it was the same judge or a different one as either one would have the jurisdiction to set aside the ex parte orders.

[16] Now, the appellant had relied on the cases of *Badiaddin* and *Arul Lurthusamy* to make the point that the High Court in the present case had no jurisdiction to set aside the orders of the earlier judge. With respect, these cases are of no assistance to the appellant as in those cases, separate or collateral proceedings in fresh actions were mounted to set aside the earlier orders of the same court.

[17] It is nevertheless noteworthy that in *Badiaddin*, the Federal Court held that a court of unlimited jurisdiction has inherent power to set aside its orders made in breach of a written law. The doctrine of estoppel in the form of res judicata or the functus officio theory had no application in such a case (per Gopal Sri Ram JCA). The Federal Court also recognised that the discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases, where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice (per Mohd Azmi FCJ). So, even if a separate action had been instituted, the ex parte orders

would have been set aside for breach of a court order and breach of natural justice.

[18] Coming now to the third appeal, learned counsel for the appellant graciously conceded that since the leave orders were set aside and the appeals were unsuccessful, she was unable to add anything useful in addition to her written submissions. In this context, we would observe that learned counsel was right to concede, as she did, as the writ action could not be commenced without leave.

[19] In any event, it is pertinent to note that the three appeals suffer from a serious infirmity as rightly observed by the learned judge hearing the writ action. The defendants in the writ action contended that the appellant, as the executrix of Lee Tain Tshung ('deceased'), had no locus standi to commence the writ action. Two reasons were given to support this contention. First, it was argued that the interest of the deceased, that is, the shares he held in Tamparuli Granite was not included in Annexure F to the grant of probate. A decision to this effect was already made earlier by the High Court in Originating Summons BKI24-87/10 of 2014 ('OS 87 of 2014').

[20] The second reason was that the deceased was not a contributory of Tamparuli Granite as he was an undischarged bankrupt at the time of his death and thereafter his estate vested in the Director General of Insolvency. This was also decided by the learned judge in OS 87 of 2014. No appeals were filed against the decisions made in OS 87 of 2014. The learned judge considered the matters raised in the writ action an abuse of the court process on account of being res judicata.

[21] In this respect, we agree with the reasoning of the learned judge. It was significant that the sale and purchase agreement that was sought to be given effect was between two companies. It is trite law, as the learned judge observed, that the assets of the company belong to the company and not the shareholders. In consequence, we agreed that the writ action was doomed to fail for the reasons mentioned and the learned judge was right to strike out the action for reasons other than the absence of leave to commence proceedings.

CONCLUSION

[22] In the circumstances, and for the reasons we have given, we were not persuaded that the decisions of the High Court were plainly wrong. On the contrary, we found that the learned judges were entitled to come to the findings as they did and committed no error which warranted appellate interference. Accordingly, the appeals were dismissed with costs.

[23] As for costs, in respect of Appeals S-02(IM)(NCVC)-145–04 of 2016 and S-02(IM)(NCVC)-741–04 of 2016, we ordered the appellant to pay the respondents costs of RM5,000 for each appeal subject to payment of allocator fees. As for Appeal S-01(IM)(NCVC)-411–10 of 2016, we ordered the appellant to pay costs of RM5,000 to the first and second respondents, costs of RM5,000 to the third and fourth respondents and costs of RM5,000 to the fifth respondents, all subject to payment of allocator fees except in the case of the third and fourth respondents. All deposits to be refunded to the appellant. Order accordingly.

Appeal dismissed with costs.

Reported by Fatin Mohd Ismail